TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 43

WILLIAM GRAU, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 21, 1932

CERTIORARI GRANTED MAY 23, 1932

(36,702)

(36,702)

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IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

No. 8466, Crim.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM GRAU, Defendant

ORDER FILING INDICTMENT—October 19, 1931

Now come the Grand Jurors heretofore impaneled and sworn herein and by their foreman announce that they have found and now present the following indictment, viz.:

No. 8466

UNITED STATES

vs.

WILLIAM GRAU

A true bill.

John R. Downing, Foreman Grand Jury. A. M. J. Cochran, Judge.

INDICTMENT—Filed Oct. 19, 1931

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF KENTUCKY, OCTOBER TERM, 1931, HELD AT COVINGTON, KENTUCKY

The grand jurors of the United States of America, impaneled, sworn and charged to inquire within and for the Eastern District of Kentucky, upon their oaths present:

That heretofore, to wit, on the 15th day of Oct., 1931, and before the finding of this indictment, in the Eastern District of Kentucky, and within the jurisdiction of this Court, one William Grau, late of said Eastern District of Kentucky, did wilfully, unlawfully and feloniously make and manufacture certain intoxicating liquors, to wit,

whisky, in an amount in excess of one gallon, and not as a casual employee only, for beverage purposes, at the premises located at No. 18 Loraine Court, Woodlawn, Newport, Campbell County, Kentucky, and other intoxicating liquors to the grand jurors unknown; the said making and manufacturing of said intoxicating liquors being then and there prohibited and unlawful;

[fol. 2] Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Second Count

The grand jurors of the United States of America, impaneled, sworn and charged to inquire within and for the Eastern District of Kentucky, upon their oaths present:

That heretofore, to wit, on the 15th day of October, 1931, and before the finding of this indictment, in the Eastern District of Kentucky, and within the jurisdiction of this Court, the said William Grau, late of said Eastern District of Kentucky, did wilfully and unlawfully possess and have in his possession certain property designed for the unlawful manufacture of intoxicating liquors, intended for use in violation of Title 27, Sec. 12-39 U. S. C. A., to wit, a still, worm, still cap, thumping keg, flake stand, piping, furnace, fermenters, process keg, mash rake, mash, pomace, still beer, low wines, malt corn, meal, at the premises located at No. 18 Loraine Court, Woodlawn, Newport Campbell County, Kentucky, and other property to the grand jurors unknown, the said possessing and having in possession of said property being then and there prohibited and unlawful;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Title 27, Sec. 12-39 U. S. C. A.

Sawyer A. Smith, United States Attorney.

[fol. 3] Indorsement on back of Indictment: No. 8466. United States District Court, Eastern District of Kentucky. The United States vs. William Grau. Indictment for Violation of Sections 12 and 39, Title 27, U. S. C. A., Unlaw-

fully Manufacturing and Possessing Property Designed for Manufacturing Intoxicating Liquors. A True Bill. Jno. R. Downing, Foreman Grand Jury, Eastern District of Kentucky. Filed Oct. 19, 1931. S. W. Stacey, Clerk U. S. District Court. Verdict. We, the jury, find the defendant guilty this 21st day of October, 1931. Edwin C. Rabe, Foreman. Witnesses: F. M. Curtis, W. K. Redman, H. B. Sandlin, J. T. Tartar.

[fol. 4] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING PETITION TO QUASH—October 20, 1931

Came the defendant, by counsel, and offered for filing Petition of the defendant, William Grau, to quash the Search Warrant and to suppress evidence and information secured through the illegal search thereunder, and the Court, being fully advised ordered that the said petition be filed, and that the same be overruled, to which ruling of the court, defendant by counsel, objects and excepts.

The defendant, by counsel, pleads that he is not guilty as charge- in the indictment herein.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

PETITION TO QUASH THE SEARCH WARRANT AND TO SUPPRESS EVIDENCE—Filed October 20, 1931

The petitioner, William Grau, says that he is the defendant herein.

He says that on the 15 day of October, 1931, a search warrant was issued by Hon. Edward W. Pflueger, United States Commissioner, at Covington, Kentucky, directed to the Internal Revenue Officer of the United States for the Eastern District of Kentucky, and to his deputies or any of them, and to F. M. Curtis or H. B. Sandlin, Federal Prohibition Agents, commanding them to search certain premises of your petitioner known as 18 Lorraine Court, Woodlawn, Newport, Campbell County, Kentucky, in the Eastern Dis-

trict of Kentucky, for intoxicating liquors and property designed for the manufacture of intoxicating liquors and to seize any such liquors and property found therein, and bring them before the said Commissioner.

[fol. 5] Said search warrant is on a printed form, the only language thereon not printed being the names of F. M. Curtis and H. B. Sandlin, witnesses and federal prohibition agents, the description of the premises, the date of the warrant and the name of the said Commissioner who issued same. Said search warrant and the return made thereon as hereinafter set forth, are in words and figures as follows, to-wit:

Search Warrant

"UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

To the Internal Revenue Officer of the United States for the Eastern District of Kentucky and to his deputies, or any of them, and to F. M. Curtis or H. B. Sandlin, Federal Prohibition Agent:

Whereas, F. M. Curtis and H. S. Sandlin, has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described, as a means of committing a felony or misdemeanor against the United States; and whereas said complainant, before the issuing of this warrant, has been examined on oath by the undersigned Commissioner; and that probable cause, supported by said affidavit, has been shown that said property is being used to commit a felony or misdemeanor, to-wit: unlawful manufacture, possession and sale of intoxicating liquor (whisky & still); and whereas said affidavit names the person and particularly describes the property and place to be searched and sets forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; and whereas the undersigned Commissioner is now satisfied of the existence of the grounds of the application for this warrant and that there is probable cause to believe their existence, now therefore,

You are hereby commanded forthwith to search the place hereinafter particularly described for the property specified, to wit: intoxicating liquors and property designed for the manufacture of intoxicating liquors, and to seize and bring said property and all other evidence of such felony or [fol. 6] misdemeanor before the undersigned Commissioner.

This search warrant may be served by you, but by no other person except in aid of you, you requiring his aid and being present and acting in its execution. You may break open any outer or inner door or window of a house or any part of a house or anything therein, to execute the warrant, if after notice of your authority and purpose, you are refused admittance; you may break open any outer or inner door or window of a house for the purpose of liberating a person, who, having entered to aid you in the execution of the warrant, is detained therein, or when necessary for your own liberation; this warrant may be served at any time of the day or night; and must be executed and returned to the undersigned Commissioner within ten days of its date; unless executed within ten days after this date, this warrant shall be void. Should you take the property under this warrant, you shall give a copy of the warrant, together with a receipt for the property (specifying it in detail) to the person from whom it was taken or in whose possession it was found, or in the absence of any person said copy and receipt must be left in the place where said property is found. You will forthwith return the warrant to the undersigned Commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant if they are present, verified by your affidavit at the bottom of the inventory and taken before the undersigned Commissioner.

The place or premises which you are hereby directed to search as aforesaid is described as follows:

Premises known as 18 Loraine Court, Woodlawn, Newport, Campbell County, Kentucky, and being situated in the — and State of Kentucky and within the district above named, and occupied by persons unknown.

Given under my hand and seal on this Oct. 15, 1931.

Edw. W. Pflueger, U. S. Commissioner as aforesaid.

(Seal.)

Return

The undersigned, to whom the foregoing warrant was issued and delivered for execution, certified that he this day executed said warrant by searching the premises therein named and that as a result of said search he found and seized the following property:

[fol. 7] 1 200 gal. copper still complete.
32 50 gal. fermenters.
1600 gal. Still beer.
350 gal. Moonshine whisky—200 empty gal. cans.
1 50 gal. copper tank, 100 ft. tin hose, 30 ft. 2 in. copper tubing.
2 Electric motors and 12-2 ft. gas burners.

He says that the above inventory contains a true and detailed account of all the property taken by him on said warrant.

He makes this his receipt to the person from whose possession said property was taken.

H. B. Sandlin, F. P. A.

Subscribed and sworn to before me this —— —, ——. —— ——, U. S. Commissioner, Eastern District of Kentucky."

Your petitioner says that acting in the official capacities under said search warrant, said F. M. Curtis and H. B. Sandlin, who were then and still are Federal Prohibition Agents, on said date searched said premises of your petitioner and then and there found and seized therein and carried away therefrom, certain articles which were the property of your petitioner and in his possession, and which are described in the return on said warrant made by H. B. Sandlin, Federal Prohibition Agent, as follows:

1 200 gal. copper still complete.
32 50 gal. fermenters.
1600 gal. Still beer.
350 gal. Moonshine whisky—200 empty 1 gal. cans.
1 50 gal. copper tank, 100 ft. 1 in. hose; 30 ft. 2 in. copper tubing.
2 Electric motors and 12-2 ft. gas burners.

A copy of said search warrant and of the return thereon was delivered by said officers to your petition at the time

of said search, and same is filed as a part hereof marked "A."

Said articles so seized are now in the possession of said Federal Prohibition Agents, said U. S. Commissioner, the United States Marshal and the United States Attorney for [fol. 8] the Eastern District of Kentucky, who are holding same without the consent and against the will of your petitioner; and said articles will, unless prevented by order of this Court be introduced by them in evidence against your petitioner at the trial herein, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States and under section 25 Title 11 of the National Prohibition Act, and under the Act of Congress of June 15, 1917, 40 Stats., section 228 et seq.

Said search warrant was issued and executed illegally, for the following reasons, to-wit:

First

Said search warrant contains no statement of any particular grounds or probable cause for its issuance, and sets out no evidential matter or statement of facts contained in the affidavits referred to in the warrant, but recites merely in language that is printed, except for the names of the witnesses, that whereas F. M. Curtis and H. S. Sandlin have made oath as complainant and presented written affidavits alleging that

"intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described," etc.

Said language is merely general and refers only to a conclusion or opinion of said affiants, and recites no evidential matter or statement of fact in either of said affidavits, and states no particular grounds or probable cause for the issuance of said warrant, which for said reasons was issued and served illegally and is void under section 6 of said Act of June 15, 1917, which provides as follows:

"Sec. 6. If the judge or Commissioner is therefore satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name

of office, to a civil officer of the United States, stating the particular grounds or probable cause, for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and [fol. 9] to bring it before the judge or commissioner."

Your petitioner says that by the provisions of Section 25, Title 11, of the National Prohibition Act search warrants may issue only as provided in said Act of June 15, 1917, 40 Stats., sec. 228 et seq.

Second

The said premises of your petitioner described in said search warrant and searched thereunder as aforesaid were at the time said warrant was issued and when said search was made, and had been since long prior thereto, and still are, his private dwelling occupied as such by him and his wife and two children, and same was not at any of said times being used in part or at all for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house, or for any business purpose.

Your petitioner says that there was no evidence before said U. S. Commissioner when said search warrant was issued by him that your petitioner's said dwelling was being used for the unlawful sale of intoxicating liquors, and said warrant mentions no such evidence, and said warrant was therefore issued and executed unlawfully in violation of Section 25, Title 11, of the National Prohibition Act, which provides in part as follows:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel or boarding house."

Third

The said Commissioner when issuing said search warrant had filed with him only two affidavits as grounds for

the application therefor, and no other evidence whatever therefor. One of said affidavits was subscribed and sworn to by said F. M. Curtis and is in words and figures as follows:

[fol. 10] "Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14th, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.

F. M. Curtis, F. P. A.

Approved.

M. W. Moore, Ast. U. S. Attorney.

Sworn to before me and subscribed in my presence this October 15, 1931. Edw. W. Pflueger, United States Commissioner."

A copy of said affidavit is filed as a part hereof marked "B."

Said affidavit was not a legal basis for the issuance of said search warrant to search said dwelling, and even if sufficient cannot be considered as supporting said search warrant, for the following reasons:

a. Said affidavits states that the affiant on October 14, 1931, saw persons haul cans commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place; and that there is a still and whiskey mash on the premises.

Said language does not constitute evidence that said dwelling was being used for the unlawful sale of intoxicating liquor, and is not sufficient to authorize the issual of a warrant to search said dwelling.

b. Said allegations in said affidavit are not even recited or referred to in said search warrant as the particular grounds or probable cause for its issual, as required by section 6 of the Act of June 15, 1917, above set out; and they can therefore not be considered as grounds for the issual of said search warrant.

The second affidavit is subscribed by H. B. Sandlin and is in words and figures as follows, to-wit:

[fol. 11] Affidavit for Search Warrant

"UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Be It Remembered, That on this day, before Edw. W. Pflueger, a United States Commissioner for the Eastern District of Kentucky, came H. B. Sandlin, a Federal Prohibition Agent, who being duly sworn, deposes and says that there is probable cause to believe and he does believe that the laws of the United States, particularly the National Prohibition Act, are being violated by reason of the fact that intoxicating liquor, to-wit: whiskey & still is being unlawfully possessed, manufactured and sold, and possessed for sale on the premises situate in County of Campbell, and State of Kentucky, and within the district above named, occupied by persons unknown, to wit: Premises known as No. 18 Lorraine Court, Woodlawn, Campbell County, Kentucky. Said charge is supported by facts set forth in the affidavit (hereto attached) of F. M. Curtis, F. P. A.

Wherefore affiant applies for a Search Warrant authorizing the search of said premises for and seizure of, evidence of said violations.

H. B. Sandlin, F. P. A. (Affiant).

Sworn to before me and subscribed in my presence this Oct. 15, 1931. Edw. W. Pflueger, United States Commissioner as Aforesaid.

This cause coming on for hearing on the application for a search warrant supported by the affidavit above set forth, the undersigned commissioner thereupon being satisfied that there is probable cause to believe that the grounds set

forth in said application and affidavit exist, and that the law is being violated as charged, does hereby so find.

Edw. W. Pflueger, United States Commissioner as Aforesaid."

A copy of said affidavit is filed as a part hereof marked "C."

Said affidavit forms no basis for the issuance of said search warrant because it contains no evidential matter whatever, and no statement of facts, but only the opinion or conclusions of the affiant, and states no facts showing [fol. 12] that said dwelling was being used for the unlawful sale of intoxicating liquor.

Fourth

The name of the petitioner was not mentioned in said search warrant or in either of said affidavits.

Wherefore your petitioner prays that said search warrant be quashed; that said articles seized in the search thereunder and that all evidence and information acquired through said search be suppressed and excluded from the trial herein.

Charlton B. Thompson, Stephens L. Blakely, Attorneys for Petitioner.

The affiant, William Grau, says that he is the above mentioned petitioner and that the statements in the foregoing petition are true.

William Grau.

Subscribed and sworn to before me by the said William Grau this 20 day of October, 1931. M. C. Reinke, Notary Public, Kenton Co., Ky. My com. expired March 14, 1935. (Seal.)

EXHIBIT A TO PETITION TO QUASH—Filed October 20, 1931

Search Warrant

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

To the Internal Revenue Officer of the United States for the Eastern District of Kentucky and to his deputies, or any of them, and to F. M. Curtis or H. B. Sandlin, Federal Prohibition Agent:

Whereas F. M. Curtis and H. B. Sandlin has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described, as a means of committing a [fol. 13] felony or misdemeanor against the United States; and whereas said complainant, before the issuing of this warrant, has been examined on oath by the undersigned Commissioner, and that probable cause, supported by said affidavit, has been shown that said property is being used to commit a felony or misdemeanor, to-wit: unlawful manufacture, possession and sale of intoxicating liquor (whisky & still); and whereas said affidavit names the person and particularly describes the property and place to be searched and sets forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; and whereas the undersigned Commissioner is now satisfied of the existence of the grounds of the application for this warrant and that there is probable cause to believe their existence, now therefore,

You are hereby commanded forthwith to search the place hereinafter particularly described for the property specified, to-wit: intoxicating liquors and property designed for the manufacture of intoxicating liquors, and to seize and bring said property and all other evidence of such felony or misdemeanor before the undersigned Commissioner.

This Search Warrant may be served by you, but by no other person except in aid of you, you requiring his aid

and being present and acting in its execution. You may break open any outer or inner door or window of a house or any part of a house or anything therein, to execute the warrant, if after notice of your authority and purpose, you are refused admittance; you may break open any outer or inner door or window of a house for the purpose of liberating a person, who, having entered to aid you in the execution of the warrant, is detained therein, or when necessary for your own liberation; this warrant may be served at any time of the day or night; and must be executed and returned to the undersigned Commissioner within ten days of its date; unless executed within ten days after this date, this warrant shall be void. Should you take property under this warrant, you shall give a copy of the warrant, together with a receipt for the property (specifying it in detail) to the person from whom it was taken or in whose possession it was found, or in the absence of any person said copy and receipt must be left in the place where said property is found. You will forthwith return the warrant to the undersigned Commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and [fol. 14] of the applicant for the warrant if they are present, verified by your affidavit at the bottom of the inventory and taken before the undersigned Commissioner.

The place or premises which you are hereby directed to search as aforesaid is described as follows:

Premises known as 18 Loraine Court—Woodlawn—Newport, Campbell County, Kentucky,

and being situated in the — and State of Kentucky and within the district above named, and occupied by persons unknown.

Given under my hand and seal on this Oct. 15, 1931.

Edw. W. Pflueger, U. S. Commissioner as Aforesaid.

(Seal.)

Return

The undersigned, to whom the foregoing warrant was issued and delivered for execution, certifies that he this day executed said warrant by searching the premises

therein named and that as a result of said search he found and seized the following property:

1 200 gal. copper still complete.

32 50 gal. fermenters.

1,600 gal. still beer.

350 gal. moonshine whisky, 200 empty 1 gal. cans.

1 50 gal. copper tank, 100 ft. 1 in. hose, 30 ft. 2 in. copper tubing.

2 Electric motors and 12 2 ft. gas burners.

He says that the above inventory contains a true and detailed account of all the property taken by him on said warrant.

He makes this his receipt to the person from whose possession said property was taken.

H. B. Sandlin, F. P. A.

Subscribed and sworn to before me this —— —, ——. —— ——, U. S. Commissioner, Eastern District of Kentucky.

[fol. 15] EXHIBIT B TO PETITION TO QUASH

Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.

F. M. Curtis, F. P. A.

Approved.

M. W. Moore, Asst. U. S. Attorney.

Sworn to before me and subscribed in my presence this October 15, 1931. Edw. W. Pflueger, United States Commissioner.

Affidavit for Search Warrant

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Be It Remembered, That on this day, before Edw. W. Pflueger, a United States Commissioner for the Eastern District of Kentucky, came H. B. Sandlin, a Federal Prohibition Agent, who being duly sworn, deposes and says there is probable cause to believe, and he does believe that the laws of the United States, particularly The National Prohibition Act, are being violated by reason of the fact that intoxicating liquor, to-wit: whiskey & still is being unlawfully possessed, manufactured and sold, and possessed for sale on the premises situate in County of Campbell, and State of Kentucky, and within the district above named, occupied by persons unknown, to-wit: Premises known as No. 18 Lorraine Court, Woodlawn, Campbell County, Kentucky.

Said charge is supported by facts sets forth in the affidavit (hereto attached) of F. M. Curtis, F. P. A. Wherefore affiant applies for a Search Warrant authorizing the search of said premises for, and seizure of, evidence of said violations.

H. B. Sandlin, F. P. A. (Affiant).

[fol. 16] Sworn to before me and subscribed in my presence this Oct. 15, 1931. Edw. W. Pflueger, United States Commissioner as Aforesaid. (Seal.)

This cause coming on for hearing on the application for a search warrant supported by the affidavit above set forth, the undersigned Commissioner thereupon being satisfied that there is probable cause to believe that the grounds set forth in said application and affidavit exist, and that the law is being violated as charged, does hereby so find.

Edw. W. Pflueger, United States Commissioner as Aforesaid.

I, Edw. W. Pflueger, U. S. Commissioner, for the Eastern District of Kentucky do hereby certify that the foregoing is a true and correct copy of the original affidavit for search warrant, for premises at No. 18 Lorraine Court, Newport, Ky., as appears from the records at my office at Covington.

Edw. W. Pflueger, U. S. Commissioner. (Seal.)

IN UNITED STATES DISTRICT COURT

VERDICT—October 21, 1931

This cause coming on for trial, came the parties plaintiff and defendant, by counsel. Thereupon comes a jury of the district, to-wit:

Edwin C. Rabe, M. C. Butler, C. A. Kelley, Oscar Browning, Kenne Lillard, J. W. Elliott, Marvin Kendall, Henry Juett, N. P. Mitchell, Charles Brothers, Donald C. Wayman and Thomas Raney, who were duly sworn to well and truly try the issues joined. The jury heard the testimony for plaintiff. Came the defendant, by counsel, and moved the [fol. 17] court for peremptory instructions to find the defendant not guilty, and the court being fully advised, overrules said motion to which ruling of the court the defendant, by counsel, objects and excepts. No evidence was introduced for defendant. The jury herein upon their oaths say the defendant is guilty, and said defendant is committed to the custody of the marshal to await the further order of the court.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL AND MOTION FOR ARREST OF JUDGMENT—October 26, 1931

Came the defendant, by counsel, and filed motion and grounds for new trial herein, and the court being fully advised, it is ordered that said motion be and the same is overruled, to which ruling of the court, defendant, by counsel, objects and excepts.

Came the defendant, by counsel, and filed Motion for arrest of judgment herein, and the court being fully advised, it is ordered that the said motion be and the same is overruled, to which ruling of the court, defendant, by counsel, objects and excepts.

A. M. J. Cochran, Judge.

[fol. 18] IN UNITED STATES DISTRICT COURT

MOTION AND GROUNDS FOR A NEW TRIAL—Filed October 26, 1931

The defendant moves the court to set aside the verdict herein and grant him a new trial for the following reasons:

1st. Because the verdict of the jury is contrary to the law and the evidence.

2nd. Because the court erred in admitting incompetent and immaterial evidence against the defendant, to which the defendant objected and excepted at the time.

3rd. Because the court erred in overruling the defendant's motion to quash the search warrant and suppress the evidence thereunder obtained, to which the defendant objected and excepted at the time.

4. Because the court erred in admitting in evidence the testimony of the witnesses with reference to the articles and property found in the residence of the defendant, and in admitting in evidence the testimony of the several witnesses with reference to the admissions obtained from the defendant at his residence and at the time when the officers and witnesses were there under the search warrant, to all of which the defendant objected and excepted at the time.

5th. Because the court erred in overruling the defendant's motion for a peremptory instruction made at the conclusion of the testimony for the United States, to which ruling the defendant objected and excepted at the time.

6th. The court instructed the jury that the evidence obtained under the search warrant, to-wit: the still, fermenters, moonshine whisky, mash, rubber hose and empty cans, were evidence tending to establish the truth of the charge of manufacturing whisky, and further instructed the jury that the search was legal and the evidence introduced was competent evidence, and the defendant says that the court erred in these respects.

7th. The verdict of the jury found the defendant guilty without specifying the count on which he was found guilty. The court erred in receiving and filing this verdict.

8th. The court erred in failing to instruct the jury on the second count of the indictment with reference to the possession of intoxicating liquor and of property designed for the manufacture of intoxicating liquor. The defendant ob-
[fol. 19] jected and excepted to these charges of the court.

C. B. Thompson, Stephens L. Blakely, Attorneys for Defendant.

In United States District Court

Motion for Arrest of Judgment—Filed October 26, 1931

The defendant, William Grau, moves the court for an arrest of judgment on each and every count of the indictmen herein upon which this defendant was convicted:

1st. Because the facts herein do not constitute an offense against the United States.

2nd. The facts adduced in the trial of this case are insufficient to support a conviction under said indictment or any count thereof.

3rd. The instructions of the court did not authorize the jury to find a verdict of guilty on the charge of possession.

4th. The verdict of the jury did not specify on which count it found the defendant guilty.

5th. The indictment did not charge the offense of sale upon which alone a search of defendant's residence could be legally made.

C. B. Thompson, Stephens L. Blakely, Attorneys for defendant.

[fol. 20] In United States District Court

Order of Sentence—Entered October 26, 1931

The defendant having heretofore been convicted and having nothing further to say is sentenced to be imprisoned in the United States Penitentiary, Atlanta, Georgia, for a period of five years.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 26, 1931

To the District Attorney for the Eastern District of Kentucky:

Comes counsel for the defendant and herewith serves notice to the District Attorney for the Eastern District of Kentucky that the defendant will appeal from the judgment heretofore rendered in said cause to the United States Court of Appeals, for the reasons set forth in the motion and grounds heretofore set forth for a new trial.

C. B. Thompson, Stephens L. Blakely, Attorneys for defendant.

Accepted this 26th day of October, 1931. Sawyer A. Smith, District Attorney.

[fol. 21] IN UNITED STATES DISTRICT COURT

PETITION FOR AN APPEAL AND BAIL—Filed October 26, 1931

Now comes the defendant, William Grau, and says that on or about the 26th day of October, 1931, this Honorable Court entered a judgment herein in favor of the United States of America and against this defendant and in which judgment and proceedings had prior thereto in this case, certain errors were permitted to the prejudice of the defendant, all of which, more in detail, appear in the assignment of errors and motion and grounds for a new trial which are filed with this petition.

Wherefore, the defendant, William Grau, prays that a writ of error or appeal be issued in his behalf out of the United States Circuit Court of Appeals for the Sixth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Circuit Court of Appeals for the Sixth Circuit of the United States, and that the writ of error or appeal, pending the determination of the proceedings on the writ or appeal, operate as a supersedeas and that this defendant be admitted to bail on said appeal.

C. B. Thompson, Stephens L. Blakely, Attorneys for defendant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered October 26, 1931

Upon the reading of the petition of the defendant, William Grau, it is ordered that the appeal be and the same is hereby allowed to said petition from the United States District Court for the Eastern District of Kentucky to the United States Circuit Court of Appeals, for the Sixth Circuit, as prayed in said petition. It is further ordered that the defendant execute a bond on the appeal in the sum of five hundred ($500.00) dollars.

A. M. J. Cochran, Judge.

[fol. 22] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed October 26, 1931

The defendant, William Grau, by Charlton B. Thompson and Stephens L. Blakely, his counsel, in connection with his petition for an appeal, makes the following assignment of errors, which he alleges occurred upon the trial of said cause and procedings had therein and upon which he will rely on the prosecution of proceedings on appeal in the above styled cause, to-wit:

1st. The court erred in denying the petition and overruling the motion of the defendant made in advance of the trial to quash the search warrant herein and to suppress all evidence and information obtained by the unlawful search of the defendant's residence thereunder, said search having been made in violation of the Fourth Amendment to the Constitution of the United States and of certain statutes of the United States and the introduction of evidence so secured being in violation of the Fifth Amendment to the Constitution of the United States and of said statutes all of which is fully set out in said petition. To said order overruling this motion, the defendant, William Grau, excepted.

2nd. The court erred in admitting over the objection and exception of the defendant the testimony of F. M. Curtis, H. B. Sandlin and J. T. Tartar concerning the information

secured in the illegal search of defendant's residence.

3rd. The court erred, over the exception of this defendant, in overruling the motion made at the conclusion of the evidence of the United States to instruct the jury peremptorily to find the defendant not guilty under each county of the indictment on the grounds:

First. That there was no evidence of the manufacture of intoxicating liquors, and

Second. That all of the evidence introduced at the trial was illegally obtained by an illegal search of the defendant's residence in violation of said statutes of the United States and of the Fourth and Fifth Amendments to the Constitution of the United States.

Third. The verdict of the jury is contrary to the evidence and is not supported by any evidence.

Wherefore defendant and appellant pray that the judgment in error may be reversed.

C. B. Thompson, Stephens L. Blakely, Attorneys for defendant.

[fol. 23] In United States District Court

Order for Appearance Bond—Entered October 26, 1931

It appearing to the Court that order has been entered allowing appeal to the United States Circuit Court of Appeals: It is now ordered that the defendant be permitted to execute bond in the sum of $5,000.00 for his appearance when called by this court.

A. M. J. Cochran, Judge.

In United States District Court

Præcipe for Transcript—Filed October 28, 1931

To the Honorable S. W. Stacey, Clerk of the United States District Court for the Eastern District of Kentucky:

You will please copy the entire record in the above styled cause to be filed in the Circuit Court of Appeals.

Charlton B. Thompson, Stephens L. Blakely, Attorneys for Defendant.

[fol. 24] Citation, in usual form, showing service on Sawyer A. Smith, omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed November 9, 1931

The witness, F. M. CURTIS testified as follows:

My name is F. M. Curtis and I am a Federal Prohibition Officer. On or about October 15, 1931, I went to No. 18 Loraine Court, Newport.

Thereupon Mr. Charlton B. Thompson, one of the attorneys for the defendant, objected and stated: If the court please, we want the record to show, without objecting any further, that we object to all of this evidence, on the ground that the evidence was illegally obtained. The court then said: Yes, it is all in over your objection and exception.

The witness thereupon continued: William Grau, the defendant was living there. I found a two hundred gallon copper still, complete, 32 Fifteen gallon fermenters, 1,600 gallons of still beer or mash, 350 gallons of whiskey, a copper whiskey tank, 200 empty gallon cans, 12 gas burners, 2 electric motors and 100 feet of two inch rubber hose. This was found in the basement. Defendant lived at this place and came in while we were there. Deputy administrator, J. T. Tartar, Investigator Keaton and agents, Sandlin and Redman were with me. This was in Campbell County in the Eastern District of Kentucky. Grau told us he had been in there about three week- I think, and that somebody told him the finger was on him and he should move out, or something like that.

Cross-examination.

By Mr. Stephens L. Blakely:

I had a search warrant when I went there. This place was a private residence, Mr. Grau lived there. Mr. Grau's wife was there when we got there and her mother or his mother, I don't know which. There were some children, some boys came in there after we got there. I don't know whether there were any there when we went or not.

The witness H. B. SANDLIN testified as follows:

My name is H. B. Sandlin and I am a Federal Prohibition Officer. On or about the 15th day of October, 1931, I went with Mr. Curtis and the other officers and searched the premises of William Grau. I found a two hundred gallon copper still complete, 32 fifty gallon fermenters, 1,600 gallons of still beer, 350 gallons of moonshine whiskey, 50 gallon copper whisky tank, 200 empty jacket cans in cartons, about two hundred feet of rubber hose and other articles used in the manufacture of liquor. This property [fol. 26] was located in the basement of the residence of Mr. William Grau, 18 Loraine Court, Newport, Kentucky. Mr. Grau came in after we began destroying the still. This was his residence, his home and he said he had been there about three weeks, and he had information that they had their finger on him and he was going to move out.

The witness J. T. TARTAR testified as follows:

My name is J. T. Tartar and I hold the position of deputy administrator and my office is at Lexington, Kentucky. I went along with the officers on the occasion testified to. We found one 200 gallon copper still, 32 fifty gallon fermenters, 350 gallons moonshine whisky, 1,600 gallons of mash, about 200 feet of rubber hose and about 200 empty whisky cans. This was all located in the basement of the house and the defendant said he had been there about three weeks, operating about three weeks. This was the defendant's home.

Thereupon the defendant moved for a peremptory instruction to find the defendant not guilty, which motion was overruled. Thereupon the defendant rested and Mr. Stephens L. Blakely, one of the attorneys for the defendant stated:

"We would like for our motion for a peremptory instruction to go to each separate charge, the charge of manufacturing and the charge of possession. And, we move for a peremptory instruction on the ground that the evidence does not show that there was any manufacture there and on the further ground that the evidence was illegally obtained."

Thereupon the court overruled the motion, to which ruling of the court the defendant excepted.

Thereupon, the court charged the jury as follows:

"GENTLEMEN OF THE JURY, the defendant in this case is charged with the offense of manufacturing whiskey for beverage purposes, and having in his possession articles designed for that purpose. If you believe from the evidence beyond a reasonable doubt that the defendant did manufacture whisky *whisky* for beverage purposes in the house described here in the evidence, you will find him guilty; otherwise acquit him. He is presumed to be inno- [fol. 27] cent until proven guilty beyond a reasonable doubt, which presumption is an item of evidence in his favor until you are satisfied beyond a reasonable doubt of his guilt.

"It was brought out in the evidence here, that this was the defendant's home—his residence, where he lived with his family, and the home could not be searched except under a search warrant. There was a search warrant here and the search was legal, and the evidence introduced here tending to establish the truth of the charge, was competent evidence. So, if you believe from this evidence beyond a reasonable doubt, that he was manufacturing whisky, you should find him guilty; otherwise acquit him. Give the jury the indictment."

Thereupon the defendant objected to the instructions of the court on the ground that there was no evidence of manufacture and also on the ground that the search was illegal.

The defendant, William Grau, tenders this Bill of Exceptions and on the motion of William Grau said above Bill of Exceptions is examined, signed, attested and approved by the court. Said testimony as hereinabove set out, purporting to be the stenographer's report, is examined, signed, approved and attested and it is now ordered that same be filed and made part of the record without being spread on the order book and it is now certified that this Bill of Exceptions contains all of the evidence in the case.

A. M. J. Cochran, Judge.

Approved.

Sawyer A. Smith, Attorney for Plaintiff. C. B. Thompson, Stephens L. Blakely, Attorneys for Defendant.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] Minute entry of argument and submission February 2, 1932, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed March 11, 1932

Appeal from the District Court of the United States for the Eastern District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed March 11, 1932

Before Moorman, Hicks, and Hickenlooper, Circuit Judges

HICKENLOOPER, Circuit Judge:

The only question presented by this appeal is that of the constitutionality and validity, under the Fourth Amend-
[fol. 30] ment and the National Prohibition Act, of a search of the private dwelling of appellant and the seizure there of a still and large quantities of intoxicating liquor, mash, etc. The warrant under which the search was conducted, in compliance, or attempted compliance, with Paragraph 6 of the Act of June 15, 1917, ch. 30, 40 Stat. 228, stated that whereas F. M. Curtis and H. S. Sandlin had made oath as complainants, and had presented their written affidavits "alleging that intoxicating liquors and prop-

erty designed for the manufacture of intoxicating liquor have been and are being possessed, used and sold upon the premises hereinafter described," which premises were those searched, the said Curtis and Sandlin, national prohibition agents, were commanded to search such premises for the property specified. We are of the opinion that the form of the warrant was sufficient compliance with the requirement of Paragraph 6 of the Act of June 15, 1917, that it shall state "the particular grounds or probable cause" for the issue of the warrant and the names of the persons whose affidavits have been taken in support thereof. The only question remaining, therefore, is whether the affidavits showed the existence of such facts and circumstances as to constitute probable cause, not only that intoxicating liquors were possessed at the premises with intent to use them in violation of the National Prohibition Act, but also that the private dwelling to be searched was "being used for the unlawful sale of intoxicating liquor" or that it was "in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house." Section 25, Title II, National Prohibition Act.

We find an authoritative definition as to what constitutes probable cause in Dumbra v. United States, 268 U. S. 435, 441. Under the definition there given there would be no doubt that the affidavit set forth facts and circumstances constituting probable cause for the belief that intoxicating liquors and property designed for the manufacture of intoxicating liquors were possessed on the premises to be searched with intent to use them in violation of the National Prohibition Act. The affidavit of F. M. Curtis averred that on or about October 14, 1931, "he went around and about the premises hereinafter described and [fol. 31] saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there, and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises." The only serious question is whether this affidavit is sufficient to justify the search under Section 25 of the National Prohibition Act.

We here again expressly abstain from decision of the question whether the manufacture of intoxicating liquor in large quantities in a dwelling house may be of such commercial character as to justify a search warrant on the theory that the dwelling is used in part for a business purpose. Compare Staker v. United States, 5 F. (2d) 312 (C. C. A. 6); Kasprowicz v. United States, 20 F. (2d) 506 (C. C. A. 6). In the first of these cases we recognized the doctrine that the National Prohibition Act does not authorize the issuance of a search warrant for a dwelling house merely because it is being used for the manufacture of liquor; in the second we held that the unlawful sale of intoxicating liquor required by Section 25 need not be a sale over a counter, or for consumption upon the premises, but that the section is satisfied by an affidavit establishing probable cause for the charge that the premises are being used for the prosecution of commercial sales, involving not only manufacture, but storage, delivery to purchasers, the filling of orders, and, generally, the maintenance of the premises to be searched as a headquarters for supervising a selling business.

We are not convinced that the position taken in the Kasprowicz case is untenable. One does not manufacture liquor for his own use in such quantities as to require wholesale deliveries of corn sugar or the other ingredients of mash; and whiskey so manufactured for personal use is not ordinarily shipped from the premises in cans, by automobile or truckload; nor are the cans in such case subsequently returned for refilling. Under the criterion established by Dumbra v. United States, such allegations are clearly adapted to warrant the belief that the dwelling is being used as headquarters for the merchandising of [fol. 32] liquor. This, we affirm, is sufficient compliance with the requirement of Section 25 that a dwelling may be searched if "being used for the unlawful sale of intoxicating liquor."

The judgment of the District Court is affirmed.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 23, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.